BEFORE THE
GOVERNING BOARD
POMONA UNIFIED SCHOOL DISTRICT

In the Matter of the Accusations Against: CERTIFICATED EMPLOYEES OF THE POMONA UNIFIED SCHOOL DISTRICT, Respondents.	OAH No. 2011030183

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 19-20, 2011, in Pomona.

Howard A. Friedman, Esq., and L. Carlos Villegas, Esq., Fagen Friedman & Fulfrost LLP, represented the Pomona Unified School District (District).

The Respondents in this matter are the 143 individuals listed in exhibit 7, attachment A. Respondents Mary Ellen Storm and Katherine Rogers were present and represented themselves. Respondent Deborah Kerr had previously requested a continuance, which was denied for reasons stated on the record, and she was not present. However, she was given leave to submit evidence and argument in writing.

Joshua Adams, Esq., and Eli Naduris-Weissman, Esq., Rothner, Segall & Greenstone, represented the 137 Respondents identified in exhibit A.

The hearing concluded on April 20, 2011, but the record remained open so that the parties could present closing arguments, and so Respondent Kerr could present her information. The following items were timely received and marked as indicated: the District's closing brief was marked as exhibit 8; the closing brief for the Respondents represented by counsel was marked as exhibit F; the argument and evidence submitted by Respondent Kerr was marked as exhibit G; the District's response to Respondent Kerr's materials was marked as exhibit 9. The record was closed and the matter was submitted for decision upon receipt of the last of the aforementioned documents on May 3, 2011.

FACTUAL FINDINGS

1. The Accusation was made and filed by Richard Martinez in his official capacity as Superintendent of the District.

2. Respondents are certificated employees of the District.

3. On February 22, 2011, pursuant to the recommendation of the Superintendent, the Governing Board (Board) of the District adopted Resolution No. 13 (2010-11) in which it determined that particular kinds of services may be reduced or discontinued at the close of the 2010-2011 school year. The Board resolved to reduce or eliminate 272.5 full-time equivalent positions (FTE) in certain services or programs performed by probationary or permanent certificated employees specifically delineated as follows:

SERVICES	FTE
Counselor-High School…….	2.0
Counselor-Middle School…….	1.0
Intervention Specialist……..	7.0
School Psychologist……..	1.0
School Site Specialist……...	4.0
Teacher-Adult School-Academics……..	25.0
Teacher-Adult School-Adults with Disabilities……..	17.0
Teacher-Adult School-Career Technical Education……	15.0
Teacher-Adult School-Older Adults……	4.0
Teacher-Adult School-Parent Education……..	6.0
Teacher-Child Development……	60.0
Teacher-Elementary…….	73.0
Teacher-Elementary-Physical Education……..	12.0
Teacher on Assignment……	6.5
Teacher-Resource…….	2.0
Teacher-Resource-Bilingual…….	4.0
Teacher-Secondary-English…….	2.0
Teacher-Secondary-Health……..	2.0
Teacher-Secondary-Technology Proficiency…….	1.0
Teacher-Secondary-Math…….	2.0
Teacher-Secondary-Physical Education…….	3.0
Teacher-Secondary-Science-Life……	3.0
Teacher-Secondary-Social Science……	3.0
Teacher-Special Education (K-12 Mild/Moderate)……	4.0
Teacher Specialist-Academic Coach…….	12.0
Teacher Specialist-Child Development…….	1.0
TOTAL FTEs Reduced or Discontinued	272.5

4. In its resolution, the Board directed the Superintendent or his designee to serve notices of termination in accordance with and in the manner prescribed by Education Code sections 44949 and 44955.[1]

[1] All further statutory references are to the Education Code.

5. The Board also adopted criteria to be used in determining the order of termination of certificated employees who first rendered paid service to the District in a probationary position on the same date. The Board resolved that the order of termination of said employees shall be determined by reference to certain tiebreaker criteria and to points assigned to each category of tiebreaker criteria. The Board further resolved that such criteria are determined to best serve the needs of the District and its students.

6. On or about March 7, 2011, pursuant to the resolution and the provisions of sections 44949 and 44955, the Superintendent gave written notice to Respondents that he had recommended to the Board that notice be given to Respondents that their services will not be required for the 2011-2012 school year. Respondents requested a hearing to determine if there is cause for not employing them for the ensuing school year.

7. On or about March 24, 2011, the District filed and timely served an Accusation, Resolution No. 13, a Statement to Respondent, a blank Notice of Defense, Request for Discovery, and pertinent sections of the Government and Education Codes upon Respondents, who filed timely Notices of Defense.

8. During the hearing, the District rescinded the layoff notices issued to Respondents Claudia DeLeon, Nancy Fegert, Wendy Garcia, Zarjii Myint, Sally Olivas, Mary Otto, Yvonne Reaza, and Richard Snyder.

9. Respondent Michael Barbera testified that he did not receive a preliminary layoff notice until April 15, 2011. Respondent Mary Lee Johnson testified that she never received a preliminary layoff notice. As a result, these Respondents contend that their preliminary layoff notices should be rescinded. The District had their correct addresses on record. It was established through the testimony of Darren Knowles, Director of Personnel Services for the District, that preliminary layoff notices were timely deposited in the US mail, certified with return receipt requested, addressed to the Respondents' addresses of record. Although these two Respondents did not receive their preliminary layoff notices at or about the time they were sent, they each timely submitted Notices of Defense and were present during the hearing. Under these circumstances, Respondent Barbera and Johnson's argument is rejected, because they were properly served with their preliminary layoff notices for purposes of the Education Code.[2]

[2] Section 44949, subdivision (d), provides that a preliminary layoff notice is properly served when deposited in United States registered mail. Section 70 allows school districts to use certified mail in lieu of registered mail. Districts are only required to deposit the preliminary notice in the mail on or before March 15th, and addressed to the last known address of the employee. (*San Jose Teachers Assn. v. Allen* (1983) 144 C.A.3d 627, 633.) In this case, the District timely deposited the two preliminary layoff notices in question by an acceptable manner of mail and properly addressed. Nothing more was required.

10. Respondent Rossy Guzman never received a preliminary layoff notice. Although the District had timely deposited her preliminary notice in US certified mail, with the proper street address and city, the District omitted her apartment number. Respondent Guzman's correct address of record with the District includes her apartment number. She had previously notified District staff that her apartment number was an important part of her address of record after another document was not received by her for the same reason. Out of an abundance of caution, Respondent Guzman inquired of her union representative when she had not received the preliminary notice on and after the March 15th deadline. Because the union representative advised her that she was on the list of certificated staff subject to layoff, she timely presented a request for hearing and later a notice of defense in response to the Accusation she received. She was also present at the hearing, during which time the ALJ dismissed the Accusation against her for lack of jurisdiction. Unlike the situations involving Respondents Barbera and Johnson, the District failed to correctly address Respondent Guzman's preliminary layoff notice, and therefore failed to serve it in conformity with the Education Code.[3]

11. The services or programs set forth in Factual Finding 3 are particular kinds of services which may be reduced or discontinued within the meaning of section 44955. The determination of the Board to reduce or discontinue these services or programs is within the sound discretion of the District and is not arbitrary or capricious. The reduction or discontinuation of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certifcated employees as determined by the Board.

12. The District has considered personnel changes due to attrition, retirements, and the releases of temporary employees in making its determination to issue layoff notices.

13. The District maintains a seniority list which contains employees' seniority dates, current assignments and locations, credentials, and authorizations. The District then identified the most junior employees working in a particular kind of service being reduced or discontinued and determined which employees would receive layoff notices.

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[3] The failure to correctly address her preliminary layoff notice was not a nonsubstantive procedural error pursuant to section 44949, subdivision (c)(3). The requirement of section 44949, subdivision (a), to send a preliminary layoff notice by no later than March 15th is jurisdictional. The failure to properly deliver the preliminary notice to Respondent Guzman constitutes a failure to abide by a jurisdictional requirement.

14. During the hearing, the District made the following seniority list changes:

Certificated Employee	New Seniority Date
Eduardo Blanquel	September 2, 2003
Leonora Calvin	April 16, 2001
Donna Caspio	April 13, 2009
James Dinh	September 6, 2005
Vijava Marathe	September 2, 2003
Lupe Marin	September 7, 2004
Yolanda Marin	December 6, 2006
Marylin Mendieta	October 2, 2004
Thelma Newsom-Cox	April 19, 2005
Eliza Porras	October 1, 2001
Patricia Zepeda	September 6, 2005
Judith Wahnon	September 1, 1999

15. The District concedes that Respondent Hamsa El-Hassaad should be recognized as having a Level I Education Specialist Instruction credential.

The Administrator Respondents

16. The following three respondents are District Administrators who contest their layoffs: Dr. Mary Ellen Storm, Katherine Rogers, and Dr. Deborah Kerr.

17. Respondent Storm contends she should not be laid off because her current position, Adult Education Coordinator, was not listed in Resolution No. 13 as a particular kind of service being reduced or eliminated. Respondent Storm was timely served with a Notice of Reassignment, removing her from her administrative position.[4] Because she retains certain rights to certificated employment as a teacher, the District also served Respondent Storm with a preliminary layoff notice. Since Respondent Storm was initially hired into the District as an administrator, her date of seniority is calculated differently from other certificated employees initially hired by the District in teaching positions.[5] Therefore, the District correctly gave Respondent Storm a seniority date in 2008, which is three years

[4] Pursuant to section 44951, an administrator can be removed from her administrative position by simply receiving a Notice of Reassignment by March 15th. Generally, an administrator attains no tenure in her administrative position and serves at the pleasure of the governing board. An administrator therefore has no right to a hearing regarding their reassignment from an administrative position. (*Hentschke v. Sink* (1973) 34 Cal.App.3d 19, 22.)

[5] Pursuant to section 44956.5, an administrator hired into a school district initially as an administrator is entitled to a maximum of three years of seniority for the total period of time served as an administrator.

before she was reassigned from her administrative position. She maintains a multiple subject teaching credential, which would allow her to teach elementary classes. But her seniority date subjects her to layoff by virtue of the reduced elementary class positions. Respondent Storm did not establish that she can bump another certificated employee. She is subject to layoff.

18. Respondent Rogers has a situation similar to Dr. Storm. Respondent Rogers was initially hired into the District as an administrator. She was timely given a Notice of Reassignment from her administrative position. Pursuant to the Education Code provisions pertaining to administrators, she only accrued three years of seniority. Since she too is credentialed to teach elementary school, she is also subject to layoff as an elementary school teacher based on her seniority date. She did not establish a basis to bump another certificated employee. She is subject to layoff.

19. Respondent Kerr complains about the District's personnel practices regarding the hiring and reassignment of administrators. However, she has no standing in this matter to contest her timely Notice of Reassignment from her administrative position (see footnote 4 above). Respondent Kerr was initially hired into the District as an administrator. Pursuant to the Education Code provisions pertaining to administrators, she only accrued three years of seniority dating back to 2008. Respondent Kerr has a credential allowing her to teach in an adult school. She did not establish a basis to bump another certificated employee. Based on her seniority date, the District properly determined that she is subject to layoff as an adult school teacher.

Seniority Date Disputes

20. Respondent Elsa Cabral disputes her assigned seniority date of November 6, 2006. She testified that her correct seniority date should be the first day of school in September 2006. She began that school year as a substitute teacher, replacing another teacher who was on maternity leave until November 3, 2006. Respondent Cabral was advised that she was serving in a substitute teaching capacity at that time. Thus, the District's assignment of her then did not run afoul of *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911. Whether or not Respondent Cabral was advised at the time in question that she was replacing another teacher on an approved leave is not relevant for purposes of determining whether her substitute assignment was proper. The important issue for purposes of *Kavanaugh* is that she was notified of her substitute assignment, and that such assignment was valid. Respondent Cabral established no basis to change her seniority date.

21. Respondent April Shivers requests her seniority date be changed from September 7, 2010, to a new date in 2008. However, her assignment was as an adult education teacher, which has a different method of accruing seniority.[6] Because Respondent

[6] Section 44929.5 provides that an adult school teacher is considered full-time for purposes of accruing seniority when she has worked at least 60 percent of the hours per week

Shivers did not work the requisite 18 hours per week for the time period in question, she was not eligible to accrue seniority. Although she later became a probationary employee in 2010, as demonstrated by her seniority date, she is not able to "tack on" her prior teaching experience, because she did not establish that she worked 75 percent of the regular school days in session, as required by section 44918.

22. Respondent Zoia Sproesser requests her seniority date be changed from September 1, 2002, to a new date in September 1998. She is also an adult school teacher. She established that in the years prior to 2002, she worked sporadic hours, ranging from 9-10 hours per week to 60 hours per month. However, she did not established that she consistently worked the requisite 18 hours per week so as to be properly considered a full-time employee entitled to accrue seniority before her given seniority date.

23. Respondent Lauren Crabtree testified that her seniority date of January 7, 2008, should be revised to November 12, 2007. In its closing brief, the District agreed, without explanation, to make that revision. Respondent Crabtree's new seniority date is therefore November 12, 2007.

24. Respondent Leslie Romero testified that her seniority date of February 1, 2007, should be revised to September 25, 2006. In its closing brief, the District agreed, without explanation, to revise Respondent Crabtree's seniority date to an earlier date of September 19, 2006. Respondent Romero's new seniority date is therefore September 19, 2006.

25. In exhibit A of its closing brief, the District revised the seniority dates of the following Respondents who neither testified nor whom stipulations were announced on the record during the hearing:

Certificated Employee	New Seniority Date
Elizabeth Arboleta	October 17, 1990
Nancy Brower	September 8, 2002
Suzanne Diaz	September 6, 2001
Arturo Farin	February 2, 2000
Irma Loyola	September 8, 2004
Cheryl Moore	October 2, 2004
Bonnie Pless	September 2, 2003
Jenny Sylvia	October 30, 2007

26. It was not established that any of the changes described in Factual Findings 14-25 will otherwise effect the layoffs of the involved individuals.

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the school district considers full-time for permanent employees. In this case, the District considers an adult school teacher to be full-time when they work at least 18 hours per week.

27. In three instances, the District acknowledged that it failed to provide preliminary layoff notices to more junior certificated employees for positions that more senior employees are certificated and competent to render. In response, the District rescinded the preliminary layoff notices of Respondents DeLeon, Fegert and Olivas, who are the most senior Respondents in the subject areas of the involved junior employees.

28. Taking into account the changes described above, no junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render.

LEGAL CONCLUSIONS

1. The party asserting a claim or making charges in an administrative hearing generally has the burden of proof. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155.) For example, in administrative hearings dealing with personnel matters, the burden of proof is ordinarily on the agency prosecuting the charges (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113); in personnel matters concerning the dismissal of a teacher for cause, the burden of proof is similarly on the discharging school district (*Gardner v. Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035). As no other law or statute requires otherwise, the standard of proof in this case requires proof to a preponderance of the evidence. (Evid. Code, § 115.)

2. All notice and jurisdictional requirements of Education Code sections 44949 and 44955 were met.

3. The services identified in Resolution No. 13 are particular kinds of services that can be reduced or discontinued pursuant to section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Services will not be reduced below mandated levels. Cause for the reduction or discontinuation of those particular services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949. (Factual Findings 1-11.)

4. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. (Factual Findings 1-11.)

5. (A) The remedy for the District's failure to provide a preliminary layoff notice to the three junior employees is to rescind the layoff notices corresponding to the senior respondent in the same subject area, as opposed to rescinding the layoff notices of all senior respondents in the same subject area. That is because application of the so-called "domino theory" is not supported by relevant legal authority. In fact, it has been noted that the proper remedy for such a situation is for a "corresponding number of the most senior employees" who did receive a layoff notice to have their notices withdrawn. (*Alexander v. Delano Joint Union High School District* (1983) 139 Cal.App.3d 567, 576.) One noted legal scholar on school district layoff cases in California disapproves of applying the domino theory in cases

of good-faith errors by districts. (Ozsogomonyan, *Teacher Layoffs in California: An Update*, (1979) 30 Hastings Law Journal 1727, 1754-1759.) Finally, the approach approved by the *Alexander* court has been generally accepted by ALJs of the Office of Administrative Hearings in cases of good faith errors by school districts.

(B) In this case, there is no evidence suggesting that the District's failure to provide the three preliminary layoff notices in question was the result of anything other than inadvertence. Because the three involved junior certificated employees were not respondents in this case, the appropriate remedy was for the District to rescind the preliminary layoff notices of the most senior certificated respondent in each subject area, which the District did during the hearing. However, the dismissal of the Accusation against Respondent Guzman for failure to properly serve her preliminary layoff notice by the March 15th deadline does not require any remedy vis a vie the other Respondents, because Respondent Guzman was already a party to this matter and her position therefore was already accounted for in the District's layoff. In any event, Respondents do not contest the District's actions with regard to these four Respondents. (Factual Findings 1-27.)

6. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render. (Factual Findings 1-28.)

ORDER

1. The Accusations against Respondents Claudia DeLeon, Nancy Fegert, Wendy Garcia, Zarjii Myint, Sally Olivas, Mary Otto, Yvonne Reaza, Richard Snyder, and Rossy Guzman are dismissed. The District shall not give them final layoff notices for the next school year.

2. The Accusations are sustained as against the remaining Respondents. The Board may give a final notice of layoff to those Respondents. Notice shall be given to those Respondents that their services will not be required for the 2011-2012 school year, and such notice shall be given in inverse order of seniority.

Dated: May 4, 2011

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ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings